97-84013-27

Dwight, Edmund

The evolution of employers' liability...

[New York]

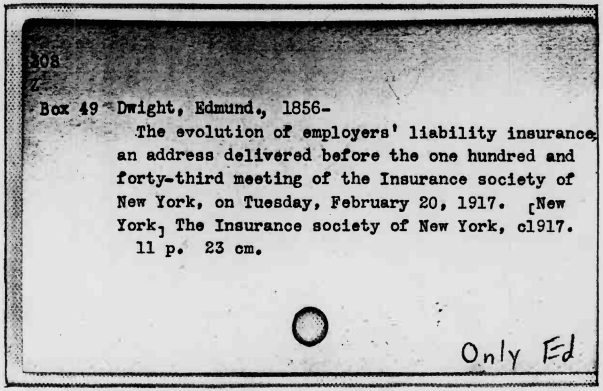
c1917

97-84013-27
MASTER NEGATIVE #

COLUMBIA UNIVERSITY LIBRARIES
PRESERVATION DIVISION

BIBLIOGRAPHIC MICROFORM TARGET

ORIGINAL MATERIAL AS FILMED - EXISTING BIBLIOGRAPHIC RECORD


308
Box 49 Dwight, Edmund., 1856-
The evolution of employers' liability insurance, an address delivered before the one hundred and forty-third meeting of the Insurance society of New York, on Tuesday, February 20, 1917. [New York] The Insurance society of New York, c1917.
11 p. 23 cm.
Only Ed

RESTRICTIONS ON USE: *Reproductions may not be made without permission from Columbia University Libraries.*

TECHNICAL MICROFORM DATA

FILM SIZE: 35mm REDUCTION RATIO: 11:1 IMAGE PLACEMENT: IA (IIA) IB IIB

DATE FILMED: 2-5-97 INITIALS: MS

TRACKING # : MSH 21117

FILMED BY PRESERVATION RESOURCES, BETHLEHEM, PA.

JUN 3 0 1917

The Evolution of Employers' Liability Insurance

AN ADDRESS

308
2
Bo+49

DELIVERED BEFORE THE ONE HUNDRED AND FORTY-THIRD MEETING OF

The Insurance Society of New York

ON

Tuesday, February 20, 1917

BY

Mr. EDMUND DWIGHT

Copyrighted, 1917, The Insurance Society of New York.

The Evolution of Employers' Liability Insurance.

A study of the history or evolution of the Employers' Liability insurance business would make an uninteresting and unprofitable discussion for an occasion of this kind if it were to become merely a review of the business aspects of this particular branch of insurance. The rise of Employers' Liability insurance, however, had its origin and its cause in two great fundamental matters of human interest and its evolution has followed and been bound up in their evolution. Therefore, I shall discuss the subject from a broader aspect than that of the technical operation of the Employers' Liability insurance business. The two great matters of human interest to which I refer are:

1. The rise and development of mechanical power.

2. The struggle of labor, influenced by the development of mechanical power, to secure to itself a larger share of the profits of industry.

Like many other great social problems, the efforts of labor to secure increased wages, shorter working hours, improved working environment and conditions, and generally a more secure tenure of position, did not take form in determined and organized effort until the introduction of mechanical power had placed man in competition with machines, and had led to the massing of population in cities and towns, but with these conditions labor began to organize and to demand an increased recognition. These movements were at first very slow, and in the earlier stages of this evolutionary process, labor disturbances were sporadic and scattered; but gradually the not unreasonable demands of labor began to find a reflection in definite and constructive legislation.

In England, after years of scattering legislation, a Royal commission was appointed in 1876, which in 1878 presented a

report affecting the labor laws generally and in that year was enacted the first great codification of the general labor laws of England. These laws dealt with all of the most troublesome conditions surrounding labor, such as, hours of employment, employment of children, safety conditions in mines and in working places generally, and while there had been, in England and other European countries, and in this country, scattering legislation on these subjects, I think that the codification of 1878 may fairly be regarded as the most important date in constructive legislation. None of these laws, however, touched the question of the legal relation of the liability of an employer to an employee for damages on account of accidents.

In ancient times there existed no such principle as the liability of one man to another for damages on account of a tortuous act, but in the evolution of sound common law doctrines, the theory of liability in damages for a personal tort was evolved, so that for many years prior to the period to which I have just referred, anyone who, by his personal negligence, or by the negligence of his agent or employee, caused injury to another, became liable to him for the damage sustained. One of the great grievances of labor was that in the application of this common law principle, an employer was not liable for the negligent act of one of his employees if the sufferer was a fellow-employee, although he was liable for such act if the sufferer was a stranger; and labor, with great justification, contended for years for the abolition of this unjust application of the law, contending that in the event of an injury to an employee caused by a fellow-worker, he should be put in the same relation to his employer in respect of his ability to collect damages as if he were not an employee.

In the discussions which followed the first introduction of this theory, popular opinion and good common sense supported the contentions of labor, with the result that, in 1880, the English Parliament enacted a law which forever did away in that country with the defense of common employment previously available to the employer. It also did away with some of the other defenses which an employer had been able to plead, but I do not go into those questions, because the strongest demand of labor which became pressing soon after 1880 was for the abolition of the defense of injury by a fellow servant.

This was the first Employers' Liability Act passed in England, and its immediate effect was that employers of labor in that country found themselves compelled to respond in damages on account of accidents in thousands of cases in which they would previously have been immune. I am laying stress upon the English Employers' Liability Act of 1880, not because it was the first legislation of the kind anywhere in the world, but because it was the first legislation which had the immediate effect of calling Employers' Liability insurance into existence. There had, in fact, been two earlier Employers' Liability laws enacted. Germany, which has always been a student of labor problems, had as early as 1871 enacted an Employers' Liability Law, upon much the same lines as the subsequent English act of 1880; and Switzerland had enacted a somewhat similar law in 1877. But it was the passage of the English Act which first led employers to perceive that they must make some provision to determine in advance the cost of industrial accidents, in the same way that provision has for centuries existed for determining in advance the cost of fires and shipwrecks. The Act had hardly been passed before a demand arose among employers for some form of insurance through which medium they could pay a fixed amount to an insurance company, which in turn would assume the uncertain cost imposed by the law. A manufacturer or contractor must know in advance of the making of his contracts what will be the cost of every element entering into the production of his goods or the performance of his work. The only way in which he can determine in advance the cost of anything which depends upon unknown future happenings is through the medium of insurance. Therefore, and in immediate response to the demand, a strong insurance company was organized in England, which began its operations in 1881, immediately following the putting of the law into effect. And this was the first venture of the kind in any part of the world.

This first venture into a new insurance field was interesting. There was very little available data to guide the actuaries in calculating the initial rates. Accident insurance had existed for many years, and in calculating the first Employers' Liability rates the experience under accident policies was first used as the basis; but accident policies covered during the whole twenty-four hours, and the accidents insured against were not only those which might happen in the course of the insured's employment and arising out of his employment, but they might occur while trav-

eling or while at home, or while engaged in any form of exercise or sport and be utterly unrelated to his employment. Therefore, the first investigation in determining rates was an attempt to segregate the recorded accidents between those which occurred in connection with the employment and those which occurred in other ways. The work of the actuaries was fairly well done, and the rates which resulted from their inquiries measurably reflected the subsequent experience, but from the very beginning of the history of Employers' Liability insurance there was and continued to be an under-estimate of the effect upon accidents which the law and the insurance itself produced. And it was not for many years that the actuaries awoke to the complete realization that the cost of caring for industrial accidents under the Employers' Liability Law was an ever increasing one. Partly, as I have said, this was due to the fact of the law itself and to the system of insurance against its provisions, but partly to other causes which are directly related to the two matters of human interest that I referred to in the beginning.

The development of mechanical power since 1880 has been very much more rapid than it was during the generation immediately preceding it. Steam engines had been in use for many years prior to 1880, and something was known of the power of electricity before that date, but mechanical developments since that time have been almost incredible. The use of electricity for commercial and domestic purposes was undreamed of until in the decade from 1880 to 1890, when the discoveries of Edison and other great scientists brought it into full play. With the development of the use of electricity there came at once an enormous increase in industrial accidents. In the same way, almost all other forms of mechanical power were rapidly developed during this period,—steam shovels, dredges, the use of cranes, and many other forms of powerful machinery used in manufacturing and in contracting enterprises, were developed, all of them increasing the hazards of mechanical work. The developments in the manufacture of steel played an enormous and interesting part in the same process. The discovery that through the use of structural steel buildings, which had never before gone to a height of more than seven or eight stories, could be carried up to almost any height, was one of the developments of the same mechanical period.

The result of all this great mechanical development was to

enormously increase the toll of life in connection with every form of industry, except mining, transportation and some other occupations in which there had always been a high mortality, and as the accidents and fatalities increased so did the cost increase, and so did the demand for insurance protection. The first company to do the business was, therefore, not left long without competition. Other companies were formed and companies which were engaged in other lines of insurance began to issue Employers' Liability policies. And thus the business grew until by 1886 there were, as nearly as I now recollect, no less than twenty-two companies engaged in the business of Employers' Liability insurance in England.

And that brings us to the time when the first experiment was tried in the United States. This country has always been very backward in its social legislation, and it may be added that it has not always been wise when it has endeavored to keep abreast of the procession. The Common Law in this country has always closely followed the Common Law of England, and the same doctrine, that the employer was not liable to an employee for damages resulting from the negligent act of a co-worker existed here that existed in England down to 1880. Work in the United States was, as a whole, carried on much less carefully than in England. Industrial accidents were far more frequent, and the lawyers of this country, who have always been ahead of the philosophers, had discovered the possibilities in the situation long prior to the English legislation on the subject.

Long before this country began to legislate on the subject, the Court calendars were filled with Master and Servant cases, with the struggle on the part of the plaintiff to show that the damages which he claimed were not the result of his own negligence or that of a fellow-employee, and on the part of the defendant to prove that they were. This was the condition when, in 1886, the company which had first begun business in England conceived that there might be an opportunity for it to do business here. They realized that while they were called into existence primarily because of an Act which removed the Common Law defenses, there nevertheless existed in this country a condition under the Common Law which was even more dangerous for an employer than as if such an Act existed; and, therefore, in 1886, the experiment was made of insuring in this country against Common Law Liability.

For the first six months after this experiment was tried it appeared to be a hopeless one from the point of view of interesting employers. The employers, as a whole, could not understand the nature of the insurance, and brokers, agents and others engaged in the insurance business, who are always more or less prone to stick to that which they fully understand, regarded the efforts to introduce this form of insurance as constituting one of the jokes of the business. But there were some employers, and particularly those in certain lines of business, who did not regard it as a joke. They found themselves perpetually harassed by damage suits and the cost of these suits was constituting an element of cost against which they could not figure in advance. This was particularly the case with two forms of activities: First of all the steamship companies. The loading and unloading of ships has at all times been one of the most dangerous of occupations, and it was in this quarter that the first real interest in the business was manifested; and the steamship companies were quickly followed by the builders, who had only just then begun to put up steel and iron buildings, so that both of these industries began to take notice of this form of insurance and accept policies.

It is interesting, in the light of the subsequent history of the business, to note how far the present cost of industrial accidents, and how far the present rates, are from the conditions of 1886. I find upon reference to my own books that the first policy covering a stevedoring risk issued in New York was written at a rate of fifty cents, and the first policy issued to cover the erection of a steel building was written at 1 per cent. The same records show that the initial rate for lumber yards was thirty cents and for saw mills fifty cents, while we carried the risk of the Central Stamping Company at fifty-five cents, and the first electric light company at eighty cents.

The first company to transact this business entered the United States in June, 1866, but, as I say, the business grew very slowly and did not attract general attention until the earlier policies which it had issued began to come around for expiration. Then followed the usual attempt to get competitive rates for these renewals and this led to the business attracting the attention of other companies. Early in 1888 an American Casualty Company set up a department for Employers' Liability insurance, and soon thereafter companies, both home and foreign, entered the field. From this point the business grew rapidly and was extended to

protection against other forms of liability for personal injuries—first, to specific policies on elevators, then to the liability of the public on account of any form of accident in connection with factories and contracting operations; then to Teams, and finally, in about 1902, when automobiles had begun to make their appearance in some numbers, the insurance of automobiles.

The variations in rates in these miscellaneous lines were as important as the Employers' Liability rates which I have referred to. The first elevator policy of which I have record was written in 1889, at a rate of $85. This is the only Liability rate which I can find which is not higher now than it was in the beginning. The earliest automobiles were written at $25.

We now come to the evolution of Employers' Liability Laws into Workmen's Compensation Laws.

In other countries than the United States it had been recognized that an Employers' Liability Law was only a half way measure of protection to the injured workman. He still had to fight for his money and to prove his case, and the conditions, while better for the workman than under the Common Law, were still unsatisfactory. Up to 1880 only three European countries—Germany, Switzerland and England—had adopted Employers' Liability Laws, but the agitation for a better system became so insistent that in almost every European country commissions were appointed to devise some other form of protection to the workman against the results of industrial accidents; and soon after 1880 the principle which is reflected in Workmen's Compensation laws began to be discussed. There was much diversity of view as to the best form in which to provide compensation without regard to the fault of the injured workman. Germany, and those countries which generally followed the German lead, adopted from the beginning the theory that the sound treatment was to compel the employer to insure his employees, while in England and France they held to the theory that the proper method was to require the employer to make compensation payments, giving him the privilege to insure against his liability or not, as he saw fit. But, gradually every European country adopted one or the other of these theories. Those which passed compulsory insurance laws were as follows: Germany, 1884; Austria, 1887; Norway, 1895; Finland, 1898; Italy, 1898 and Switzerland, 1899. It will thus be noted that with the exception of Germany and Switzerland, all of these countries passed from

a condition governed only by the Common Law direct to a compulsory insurance law.

On the other hand, Workmen's Compensation Laws were adopted as follows: England and Denmark, 1897; France and Spain, 1899. All but England passed directly from Common Law liability to Workmen's Compensation Law.

Now observe how slow the operation was in the United States. The first Employers' Liability Act of any kind was adopted by Alabama in 1885, followed by Massachusetts in 1887, and in later years by many other States, but so slow was the legislative process in this country that not a single State had adopted a Workmen's Compensation Law, either following an Employers' Liability Law or as a first step in that direction, until long after every important European country had such a law in full operation.

I only refer to this evolution of Employers' Liability business into Workmen's Compensation business because it is impossible to consider the evolution of the Employers' Liability insurance business without reference to its ultimate development into Workmen's Compensation insurance; but I shall not discuss the subject beyond this brief review of the early legislation, as I understand that the subject of Workmen's Compensation Legislation will be fully discussed at another meeting of this body.

The question was very frequently discussed in the early days of the Employers' Liability business, whether the existence of a system by which an employer could relieve himself from the consequences of his own negligence was ethically sound. The existence of such insurance was not infrequently attacked on the ground that an employer who had thus relieved himself from financial responsibility must, as a natural sequence, be less careful of the safety of his work people. It was, moreover, frequently urged that as accident to the body involved personal suffering and distress it was an impropriety to substitute a soulless corporation for the employer in all matters which affected the subsequent treatment of the case. Many people believed that employees had, as a whole, better treatment from their employers than they received when the employer transferred his risk to an insurance company. In fact, the propriety of the business, as a matter of good morals, was frequently challenged. My own belief was, from the beginning, that as a whole the employee was better off under the insurance system than without it. The difficulty of

getting a clear view of this subject was confused by the fact that the test which governed the making of payment was one of legal liability, and the companies become expert in determining which cases involved legal liability and which did not. In those cases in which there was actual negligence on the part of the employer, I am satisfied that the injured workman received, upon the average, quicker and larger payments than he had received before the system existed; but, upon the other hand, there is no doubt that very many cases occurred in which the employer was clearly free from fault, but in which the injuries were serious where payments were not made by the companies that might have been made if the employer had not been insured. This is, doubtless, one of the reasons why labor gradually became restive under a system by which they invariably had to prove their employers' negligence, and why, both in Europe and in this country, the demands for Workmen's Compensation Laws followed as a sequence to Employers' Liability Laws.

For those of us who have had to administer the business and have had to support Claim Departments in resisting claims on account of distressing and serious injuries, as to which there was no liability on the part of the employer, the change to Workmen's Compensation Laws has been a vast relief. If labor actually knew the personal attitude of those charged with the responsibility for insurance companies, it would realize that no single function of an officer or an insurance company, during the days before Compensation, was more disagreeable than the declining of a payment in case of serious accident, and that it is a matter of great satisfaction, even to the most callous Claim Departments, when they find that under the operation of the Workmen's Compensation Laws every such case is one which involves a payment, and that that payment is not subject to bargaining, but is automatic.

The Common Law relation of employer and employee, even as modified by Employers' Liability Acts, created an obnoxious situation. It is not strange that as the companies had to work under it, labor generally became inflamed against them. I believe that this prejudice is now disappearing, and we may hope that in time labor itself will recognize the insurance companies as being, upon the whole, their friends and not their enemies.

PRINTED MAY, 1917

21117

END OF
TITLE